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Supreme Court, U.S.
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No. 97-5737

In The

Supreme Court of the United States

October Term, 1997

SANDRA K. FORNEY,

Petitioner,

v.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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I. The Positions Of Petitioner, The Commissioner Of Social Security, And Amicus.

The issue presented is whether a plaintiff seeking Social Security Disability benefits may appeal a district court judgment entered pursuant to sentence four of 42 U.S.C. § 405(g), reversing, *with* a remand for a rehearing, a final decision of the Commissioner of Social Security, in order to obtain a reversal of the Commissioner's final decision, *without* a remand for a rehearing (or a more favorable remand order). Petitioner and the Commissioner agree that Petitioner may appeal such a sentence-four judgment and that Petitioner is aggrieved by that judgment, but they disagree about matters related to the latter conclusion. (*See* Br. for Pet'r at 17-28; Br. for the Resp't at 31; *see also id.* at 16-23.) Amicus argues that Petitioner is not aggrieved by the judgment, and that the judgment is not appealable. (Br. of Amicus Curiae ("Br. of A.C.") at 12-19.)

Petitioner and Amicus disagree whether Petitioner is aggrieved by the legal effect the district court's disposition of Petitioner's Complaint will have on any new administrative proceedings upon remand. While Amicus does not dispute that the law of the case applies during any new administrative proceedings, or that the Commissioner is bound by any district court remand order, Amicus contends that the effect of the law of the case, or any district court remand order, does not make Petitioner an aggrieved party. (Br. of A.C. at 22-25.) With respect to issue preclusion, Petitioner and Amicus disagree about which of the district court's rulings are "necessary to the judgment." Amicus contends that issue preclusion applies only to a single issue, while Petitioner contends the district court's judgment precludes more issues.

The Commissioner appears to take the extraordinary position that (1) issue preclusion[1] does not apply *generally* to sentence-four judgments reversing with a remand for a rehearing, (Br. for Resp't at 30-34); (2) the law of the case[2] does not apply to administrative proceedings following a sentence-four judgment but may be invoked only in subsequent civil litigation, (*id.* at 33 & n.19); and (3) on remand, the Commissioner is "free to," but not required to, follow the district court's remand order, regardless of whether the court remand order includes rulings favorable or unfavorable to the non-government party, (*id.* at 24, 34).

The Court should conclude that the district court's final decision is appealable under the normal rules of civil litigation with special reference to the procedural posture of Petitioner's case and the plain language of sentence four of 42 U.S.C. § 405(g). *United States v. Jose*, 117 S. Ct. 463 (1996); *Sullivan v. Finkelstein*, 496 U.S. 617 (1990).

II. Under Its Own Rationale, The District Court Should Have Entered Judgment Reversing The Commissioner's Final Decision, *Without* A Remand For A Rehearing, To Award Benefits.

Sentence four of 42 U.S.C. § 405(g) provides that a court "shall have power to enter, upon the pleadings and

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[1] The Commissioner's attack on issue preclusion based on court judgments is an extension of his attack on issue preclusion based on final agency actions. *See, e.g., Drummond v. Commissioner of Social Security*, 126 F.3d 837 (6th Cir. 1997).

[2] In civil litigation after a new final decision of the Commissioner, the Commissioner has resisted the reach of the law of the case. *See, e.g., Key v. Sullivan*, 925 F.2d 1056 (7th Cir. 1991). (*See also* Br. of A.C. at 22 n.18 (noting tension in Commissioner's litigation position).)

transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, *with or without* remanding the cause for a rehearing." 42 U.S.C. § 405(g) (emphasis added). Petitioner appealed a district court sentence-four judgment reversing a final decision, *with* a remand for a rehearing, on the basis that the district court was required to enter a sentence-four judgment *without* a remand for a rehearing.

Given the district court's own rationale, absent an articulated legitimate justification, the district court should have entered a sentence-four judgment *without* a remand for a rehearing. A Social Security disability claimant may be found "disabled" either at step three or at step five of the sequential analysis of disability. 20 C.F.R. § 404.1520(d) (1997) (step three); 20 C.F.R. § 404.1520(f) (1997) (step five). The Commissioner found Petitioner "not disabled" at step five. (J.A. at 27-28.) When it reviewed the Commissioner's decision finding Petitioner not disabled, the district court accepted that the Commissioner had the "burden of showing that [Petitioner] can engage in substantial gainful work in the economy[.]" (J.A. at 128.) Moreover, the district court held that the Commissioner "did not sustain her burden of proof in step five of the five-step evaluative process in determining whether [Petitioner] is entitled to benefits." (J.A. at 128.) The court reached this conclusion *accepting as true* the Commissioner's factual findings regarding Petitioner's residual functional capacity and vocational characteristics. (J.A. at 125-28.) Given the foregoing, Petitioner established her claim. Because the district court articulated no reason to give the Commissioner *another* opportunity to show that Petitioner could perform a significant number of jobs, the district court should have entered

judgment reversing the Commissioner's final decision without a remand for a rehearing. *See, e.g., Allen v. Bowen*, 881 F.2d 37 (3d Cir. 1989) ("The Secretary, in effect, asks this court for a second chance to prove his case because the testimony given by the first vocational expert did not satisfy the *Podedworny* teaching. We see no reason, however, why the Secretary should be afforded such an additional opportunity.").

As matters of law, public policy, and fairness, absent the court's articulated and legitimate justification, there should be no further administrative proceedings concerning the merits of a claim when a claimant for Social Security disability insurance benefits proves to a court that she has satisfied any burden of proof, including any burden of production or persuasion, she may have had and when the government did not satisfy any burden of proof, including any burden of production or persuasion, it may have had. Through 42 U.S.C. § 405(g), Congress has accorded claimants for Social Security disability insurance benefits this very protection – the right to court judgments reversing, *without* remands for rehearing, unfavorable agency decisions.[3]

[3] A "burden of proof" may be a burden of production and/or a burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 272-74 (1994). The issue of the precise nature of the allocation of the burden of proof at step five of the sequential analysis, 20 C.F.R. § 404.1520(f) (1997), is not before this Court. Nonetheless we note that in *Bowen v. Yuckert*, 482 U.S. 137 (1997), this Court observed that the Commissioner "bears the burden of proof at step five," and that this "allocation of burdens of proof" was within the Commissioner's regulatory authority, *id.* at 146 n.5.

Petitioner appealed the district court's judgment for other reasons as well. At step five, a claimant is "disabled" if she cannot work on a full-time basis. *See* Social Security Ruling 96-8p, 61 Fed. Reg. 34,474, 34,476 (1996) (Titles II and XVI: Assessing Residual Functional Capacity in Initial Claims). Due to this full-time work requirement, the district court should have found Petitioner disabled for two reasons. If the district court had accepted Petitioner's arguments regarding the weight due a treating physician's opinion and/or the evaluation of her credibility, the district court would have found that Petitioner could not work full time and that she was therefore disabled. (Pl.-Appellant's Br. at 18-23, 28.)[4]

The Amicus grounds its arguments in the erroneous assertion that Petitioner did not appeal the district court's judgment and that Petitioner's Ninth Circuit appeal was directed solely against the *Commissioner's* decision. (*See e.g.* Br. of A.C. at 3, 5, 21, 23-25.) Amicus overlooks that Petitioner's Notice of Appeal expressly appealed from the district court judgment. Amicus also fails to appreciate that Petitioner's appeal arose under appellate law governing *Social Security* appeals. When, pursuant to 42

[4] Contrary to appellate authority, Amicus asserts that the issues Petitioner raised (in addition to the failure of the vocational expert's testimony to carry the Commissioner's burden of proof) "are scarcely the type of challenges that, even when credited, lend themselves to outright reversal by a court lacking the authority to reweigh the evidence." (Br. of A.C. at 19 n.15.) *See, e.g., Lewis v. Callahan*, 125 F.3d 1436 (11th Cir. 1997) (awarding benefits based on review of Commissioner's evaluation of treating source opinions); *Smolen v. Chater*, 80 F.3d 1273 (9th Cir. 1996) (awarding benefits based on review of Commissioner's evaluation of claimant's testimony and treating source opinions).

U.S.C. § 405(g), a plaintiff initiates a civil action for judicial review of a final decision of the Commissioner finding that she was not under a "disability," 42 U.S.C. § 423(d), a district court determines both whether substantial evidence supports the Commissioner's final decision, including its essential subsidiary factual findings, and whether the Commissioner applied the proper legal standards when making his decision, 42 U.S.C. § 405(g) (sentence five).

Moreover, if a district court enters judgment under sentence four of section 405(g) *affirming* the Commissioner's decision, and the plaintiff appeals the district court's final decision, 28 U.S.C. § 1291, an appellate court applies the same substantial-evidence standard of review the district court applied. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420 (1971); *Johnson v. Heckler*, 741 F.2d 948, 953 (7th Cir. 1984) ("Our standard of review is the same as that of the district court pursuant to . . . 42 U.S.C. § 405(g)."). The standard of appellate review is thus *de novo*. Although an appellate court may reference a district court's rationale, *see, e.g., Allen*, 881 F.2d at 41, ultimately at issue is the *Commissioner's* final decision, not the district court's rationale for affirmance of that decision, *see, e.g., Stone v. Heckler*, 761 F.2d 530, 532 (9th Cir. 1985). Given the foregoing, in the Ninth Circuit, Petitioner argued that *the Commissioner's decision* was not supported by substantial evidence and that it was based on the application of incorrect legal standards. When arguing that Petitioner did not attack the district court's judgment in the Ninth Circuit, Amicus thus overlooks both the applicable standard of appellate review and that, in the Ninth Circuit, Petitioner expressly appealed from the district court's judgment:

> This is an appeal, in a Social Security disability case, from the Judgment of Robert E. Jones, U.S. District Judge, District of Oregon, vacating the agency's final decision that Forney was not disabled, but remanding to the agency for further proceedings. Forney appeals, and requests a finding of disability and payment of benefits, instead of remand for additional proceedings.

(Pl.-Appellant's Br. at 2.) Because the appellate standard of review is *de novo*, on appeal of the district court's sentence-four judgment, Petitioner, of course, focused on errors in the Commissioner's final decision. The unwary appellant challenges the district court's rationale, neglecting the ultimate issue – whether the Commissioner's final decision should be reversed and, if so, in what manner.

Amicus asserts that Petitioner "seeks reversal of the *agency* decision, for reasons different than those stated in the district court opinion." (Br. of A.C. at 3 (emphasis original).) Amicus makes a similar assertion in his statement of the Question Presented:

> Whether a social security claimant who succeeds in winning a district court judgment pursuant to 42 U.S.C. § 405(g), setting aside an agency decision to deny benefits and remanding to give the claimant an opportunity to secure all the benefits she seeks, is entitled to bring an appeal seeking reversal of the agency's decision *for additional reasons not relied upon by the district court in entering judgment in the claimant's favor.*

(Br. of A.C. at i (emphasis added).) Amicus thus overlooks that Petitioner appealed the district court's judgment because, *given its own reasoning and findings*, the district court should have entered judgment reversing the Commissioner's final decision, without a remand for a rehearing. At the appellate court, Petitioner argued that,

given its own rationale, the district court should have entered judgment reversing the Commissioner's decision, *without* a remand for a rehearing. Petitioner is thus aggrieved by the district court's final judgment.[5]

Amicus also erroneously argues that "a remand is plainly necessary so that additional evidence may be taken on whether employment opportunities exist for someone *with* [Petitioner's] ability." (Br. of A.C. at 19 n.15 (emphasis original).) With this proposition, Amicus ignores the significance of its citation to *Faucher v. Secretary of HHS*, 17 F.3d 171 (6th Cir. 1994).

Petitioner has endured *two* administrative hearings and, *according to the district court*, the record *already* includes the Commissioner's proffer of step-five vocational evidence for someone with Petitioner's residual functional capacity and vocational characteristics. (J.A. at 47, 125-28.) This is consistent with the record. In response to a question from an administrative law judge (ALJ), a vocational expert identified two occupations which Petitioner purportedly could perform. In response to a question whether there were *any other jobs* the vocational expert could rely on, the vocational expert answered "No." (Transcript at 88; Pl.-Appellant's Reply Br. at 14.)

The district court held that the ALJ's finding Petitioner could perform the jobs identified by the vocational expert – *assuming the validity of the ALJ's own findings regarding Petitioner's residual functional capacity* – was not

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[5] In light of Petitioner's challenge of the district court's judgment on its own terms, Amicus' heavy reliance on *California v. Rooney*, 483 U.S. 307 (1987), and its attempt to distinguish *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), are inapposite. (Br. of Amicus Curiae at 20-22 (*Rooney*); *id.* at 24-25 (*Electrical Fittings*).)

supported by substantial evidence. At that point, the district court should have reversed the ALJ's decision and directed that Petitioner be found disabled because, assuming the residual functional capacity as ultimately found by the ALJ, the vocational expert could *not* identify *any other jobs* Petitioner could perform. Thus, with the two inappropriate jobs eliminated (by the district court's holding) and *no other jobs* identifiable, it is established that Petitioner *cannot perform any jobs*, and she is, therefore, disabled. Under these circumstances, "all essential factual issues have been resolved and the record adequately establishes a plaintiff's entitlement to benefits." *Faucher*, 17 F.3d at 176.

Under such circumstances, where the Commissioner fails to satisfy his burden at step five, a court has authority to hold – and in some cases is required to hold – that the Commissioner's final decision should be reversed without a remand for a rehearing, i.e., the court should hold that the claimant is under a disability. *See, e.g., Terry v. Sullivan*, 903 F.2d 1273, 1278-80 (9th Cir. 1990) (holding the Commissioner did not satisfy his step-five burden and further fact-finding was unwarranted); *Detrick v. Chater*, 115 F.3d 573, 575 (8th Cir. 1997) (similar); *Smith v. Shalala*, 46 F.3d 45, 47 (8th Cir. 1995) (similar).

Petitioner acknowledges that the Commissioner's failure to satisfy his burden of proof at step five, however construed, does not *always* warrant reversal of the Commissioner's final decision, without a remand for a rehearing. The Commissioner's failure sometimes warrants reversal with a remand for a rehearing, *see, e.g., Light v. Social Security Admin.*, 119 F.3d 789, 793-94 (9th Cir. 1997); *Titus v. Callahan*, 133 F.3d 561, 564-65 (8th Cir. 1997). However, this Court should not find that the district

court's judgment below was not *appealable*, based on the Amicus' erroneous assertion that Petitioner would not be able to prevail on the merits before the Ninth Circuit (*i.e.*, to procure a Ninth Circuit decision holding that reversal of the Commissioner's final decision without a remand for a rehearing was warranted).

III. Petitioner Did Not Get "Everything She Asked For."

The Amicus erroneously states that "as a matter of pleading, [Petitioner] got *everything* she asked for when the District Court set aside the agency decision and remanded." (Br. of A.C. 14 (emphasis added).) Petitioner sought first and foremost reversal of the Commissioner's final decision without a remand for a rehearing, i.e., reversal and a remand for a (ministerial) finding that she was under a disability (and thus entitled to benefits). (J.A. at 37, 92-93.) Only as a lesser relief did Petitioner seek a judgment reversing with a remand "for *proper* evaluation of the evidence or a hearing *de novo*." (J.A. at 37.) Petitioner received only part[6] of the latter relief.[7]

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[6] Petitioner received a remand, but not for *proper* evaluation of the evidence and not for a *de novo* rehearing. Instead, the district court expressly ordered the agency to apply *improper* standards to the evaluation of the evidence during remand proceedings and to narrowly restrict those proceedings: "IT IS ORDERED that this case be REMANDED to the Secretary for further proceedings *in accordance with this opinion*." (J.A. at 128 (emphasis added).)

[7] Amicus claims that after the district court entered judgment Petitioner only "belatedly and self-servingly" argued that she sought as her primary relief reversal of the Commissioner's final decision without a remand for a rehearing as opposed to reversal with a remand for a rehearing. (Br. of A.C. at 15 n.12.) This claim is unreasonable given that in her Complaint Petitioner plainly stated that she first sought a reversal of the Commissioner's final decision without a remand for a rehearing and only if that relief were not granted a reversal with a remand for a "*de novo*" rehearing. (J.A. at 37.) Further, in the district court, Petitioner concluded her brief with a request for relief that mentioned *only* reversal *without* a remand for a rehearing, i.e., for a finding of disability. (J.A. at 92-93 ("and Plaintiff should be found disabled").)

A sentence-four judgment reversing a final decision of the Commissioner, *with* a remand for a rehearing, is *necessarily* a denial of the request for a judgment reversing *without* a remand for a rehearing. When the district court remanded this matter for a rehearing, it implicitly *denied* Petitioner's request for a judgment reversing the Commissioner's final decision *without* a remand for a rehearing. Thus, Amicus is simply wrong to assert that Petitioner "got everything she asked for," (Br. of A.C. at 14), particularly when Amicus accepts that, all else being equal, Petitioner has only a sixty percent chance of being found disabled after her claim is reheard by the agency, (*id.* at 13).

Amicus further argues that because Petitioner "emphatically does not challenge the *judgment* in her favor," Petitioner "runs afoul of the rule that courts review judgments, not statements in opinions." (Br. of A.C. at 8 (emphasis original).) Petitioner discussed above how this is not true. Properly understood, Petitioner's challenge to the rulings underlying the district court's denial of this requested relief is a challenge to the judgment. Hence, contrary to Amicus' arguments, issues Petitioner raised in the Ninth Circuit (besides the significance

of the Commissioner's failure to satisfy his step-five burden of proof), are subject to issue preclusion in subsequent administrative and judicial proceedings insofar as the district court's rulings on those issues *were necessary* to the district court's denial of Petitioner's request for a judgment reversing without a remand for a rehearing. Thus aggrieved, Petitioner has standing to appeal the district court's final decision for reasons other than the district court's failure to appreciate the significance of the Commissioner's failure to satisfy his burden of proof. *Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 99-101 (1954).

IV. The Availability Of Judicial Review Following An Unfavorable Decision After New Administrative Proceedings Upon Remand Will Not Provide Petitioner With An Adequate Forum To Challenge The District Court's Judgment And Order.

In support of his position that the district court's judgment is not appealable, Amicus argues that Petitioner may obtain judicial review of any of the district court's rulings if she is not found disabled after the remand proceedings. (Br. of A.C. at 14, 23, 26-29.) Amicus does not acknowledge the significance of the standard of judicial review of a new final decision of the Commissioner. If Petitioner receives an unfavorable final decision after her claim is reheard by the agency, and if Petitioner files a new complaint, the district court will determine whether *substantial evidence* supports the Commissioner's *new* final decision. 42 U.S.C. § 405(g) (sentence five). Because substantial evidence is *less than* a preponderance of the evidence, *Consolidated Edison Co. v. NLRB*, 305 U.S.

197, 229 (1938), a district court may (in some circumstances) *properly* enter a sentence-four judgment affirming the Commissioner's *new* final decision even if on remand Petitioner established to the Commissioner by a preponderance of the evidence that she was disabled. Given the substantial-evidence standard of review, this Court should find that Petitioner's right to file a new complaint following receipt of an unfavorable decision after her claim is reheard does not provide Petitioner with an adequate forum to challenge the district court's prior rulings.

The importance of the substantial-evidence standard of review is stark when one assumes, as the Court should to resolve *the issue of appealability* of the district court's final decision pursuant to 28 U.S.C. § 1291, that Petitioner correctly maintains that the district court should have entered a sentence-four judgment reversing the Commissioner's final decision, without a remand for a rehearing. Amicus would permit Petitioner to be denied benefits even though the record showed *three* times that she was disabled at step five, as follows: *First*, the Commissioner should have found Petitioner disabled at the hearing level. *Second*, the district court should have found Petitioner disabled and accordingly entered a sentence-four judgment reversing, without a remand for a rehearing, the Commissioner's final decision. *Third*, after the hypothesized proceedings upon remand, the Commissioner should have found Petitioner disabled, but a court would not reverse the Commissioner's new decision because although it was not based on a preponderance of the evidence, it was supported by substantial evidence. This Court should not endorse Amicus' position leading to this anomalous, inequitable result, particularly since

the express language of section 405(g) empowers a court to enter a judgment reversing the Commissioner's decision *without* a remand for a rehearing.

Furthermore, a Social Security plaintiff will *not* be able to obtain review of many of the unfavorable rulings in a district court's decision related to a sentence-four judgment reversing with a remand for a rehearing a final decision of the Commissioner. In most cases in which there is a rehearing following a district court reversal, additional evidence will be submitted by the claimant, by the Commissioner, or both. Judicial review of a Commissioner's unfavorable final decision following the rehearing will thus commonly involve review of significantly different factual findings on a significantly different factual record. For some matters, an expanded record will permit the Commissioner a second, third, or even fourth opportunity to satisfy his burden of proof at step five – subject only to deferential substantial evidence review – even though the pre-remand evidentiary record warranted a finding of disability.

Moreover, during remand proceedings the Commissioner may generally create new medical evidence – e.g., opinion evidence from a non-examining medical source or a report from an examining medical source – that may be substantial evidence permitting judicial affirmance of the Commissioner's *incorrect* final decision following remand proceedings.

Petitioner disagrees with the Commissioner and Amicus that a forty-percent chance of being found "not disabled" after a plaintiff's claim is reheard, (Br. of A.C. at 30 n.25; Br. of Resp't at 27), provides adequate protection of Petitioner's interests. This is especially true when, as in Petitioner's case, the pre-remand evidentiary record

interpreted in light of the applicable legal standard mandates a finding of disability: Petitioner appealed the district court's judgment because the Commissioner should not be permitted a third bite at the apple.

Viewed differently, Amicus neglects or denigrates the aspect of the district court's decision ordering the Commissioner to conduct remand proceedings consistent with its opinion. (J.A. at 128 ("IT IS ORDERED that this case be REMANDED to the Secretary for further proceedings *in accordance with this opinion.*" (italicized emphasis added).)[8] Because the Commissioner was *ordered* to conform its remand proceedings to the district court's Opinion and Order (J.A. at 118-28), Amicus' attempt to distinguish *Jose*, 117 S. Ct. 473, fails. Amicus argues that,

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[8] In order to diminish the legal significance of the district court's remand order, Amicus posits, "As is customary, the District Court did not specify the precise proceedings that must take place on remand." (Br. of Amicus Curiae at 5 n.3.) It is unclear how Amicus knows what customarily accompanies sentence-four judgments reversing, with remands for rehearings, final decisions of the Commissioner. In any case, it is clear that the Commissioner, during remand proceedings, could not, at least for the time period previously adjudicated, find Petitioner "not disabled" at step four of the sequential analysis of disability. Nor could the Commissioner find Petitioner "not disabled" at step five, without supporting vocational expert testimony. Moreover, although pursuant to the district court's order, the Commissioner should not revisit the precise issues Petitioner lost in the district court, if the Commissioner did revisit those issues in a manner advantageous to Petitioner, neither the Petitioner nor the Commissioner would have standing to argue in later judicial proceedings that the Commissioner did not comply with those rulings as incorporated in the district court's remand order.

unlike the order at issue in *Jose*, the district court's decision herein "imposes absolutely no restrictions (injunctive or otherwise) on [Petitioner] [.]" (Br. of A.C. at 26.)

To the contrary, the district court *ordered* the Commissioner on remand to follow the district court's analyses regarding the evaluation of an opinion from Petitioner's treating source and regarding Petitioner's own credibility. If the Commissioner complies with the court's mandate, Petitioner will have a much more difficult time establishing disability. Indeed, treating source opinions and claimants' credibility often are *dispositive* of a claim for disability insurance benefits. *See, e.g., Lester v. Chater*, 81 F.3d 821, 830-34 (9th Cir. 1995).

Nor is *Parr v. United States*, 351 U.S. 513 (1956), persuasive authority that the availability of judicial review following an unfavorable final decision means that Petitioner is not aggrieved. (Br. of A.C. at 16-19.) This Court held that Parr could not appeal an order of dismissal of an indictment because until Parr was retried he was not aggrieved by the indictment's dismissal. *Parr*, 351 U.S. at 518-21. Importantly, *Parr* is based on the principle that only final district court dispositions are appealable. *Id.* at 517-20. Here *Finkelstein* teaches that the district court's disposition of Plaintiff's Complaint is *final* for the purpose of 28 U.S.C. § 1291. *Finkelstein*, 496 U.S. at 624-25, 629; *see also Shalala v. Schaefer*, 509 U.S. 292, 299 (1993) (following *Finkelstein*). The *Parr* Court, in contrast, expressly characterized the indictment's dismissal as "interlocutory," *Parr*, 351 U.S. at 518. In the instant case, the district court's sentence-four judgment was *not* interlocutory. *Finkelstein*, 496 U.S. at 629.[9] Moreover, if an

[9] Amicus' reliance on the general rule that a court remand to an agency for further proceedings is not appealable as

analogy is to be drawn to the criminal context, it is significant that Parr had not been tried and jeopardy had not attached. *Parr*, 351 U.S. at 518. Petitioner, on the other hand, has been "tried" – she has undergone *two* administrative hearings and a district court review. Having established that she is "disabled," she opposes a rehearing on double jeopardy grounds.

V. Recognizing That Plaintiffs Such As Petitioner May Appeal Would Likely Decrease Appellate Workloads.

Amicus speculates that recognizing the right to appeal of plaintiffs such as Petitioner could lead to a "substantial" increase in the number of appellate cases. (Br. of A.C. at 33.) Such speculation ignores a central function of the appellate courts – providing guidance to district courts regarding proper legal standards.[10] If, for example, Petitioner were to convince the Ninth Circuit that the district court should have entered a judgment reversing *without* a remand for a rehearing, and if the Ninth Circuit were to publish its decision, district courts within the circuit might be less likely to *fail* to enter, when appropriate, sentence-four judgments reversing

interlocutory, (Br. of A.C. at 10 n.7), is misguided in light of the plain language of § 405(g). As explained in *Finkelstein*, a judgment entered pursuant to sentence four of § 405(g) is *final* (i.e., *not* interlocutory), even though that judgment is accompanied by an order of remand.

[10] *Cf. Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48, 55 (1952) (Frankfurter, J., dissenting) ("Not the least important business of this Court is to guide the lower courts and the Bar in the effective and economical conduct of litigation.")

without remands for rehearings. Application by the district courts of such appellate guidance would substantially reduce the need for appellate litigation, and it would simultaneously obviate many unnecessary new administrative proceedings. Of itself, the value of such guidance is reason to permit Petitioner to appeal.

Amicus' speculation that there would be a "substantial" increase in the number of appeals to federal appellate courts if this Court found that plaintiffs such as Petitioner could appeal is unfounded. *Finkelstein* was published in 1990, and it fairly announced sentence-four judgments to be appealable. Under the deferential "substantial evidence" standard of review, however, appellate courts affirm the vast majority of appeals of final decisions of the Commissioner finding claimants "not disabled." Moreover, since the publication of *Finkelstein*, apart from Petitioner's, there are only two published cases, and a handful of unpublished cases, where such plaintiffs have appealed sentence-four judgments remanding for a rehearing.[11] Given this background, it is unlikely that this Court's clarifying Petitioner's right to appeal will suddenly inspire similarly situated plaintiffs to appeal.

To achieve outright reversals, appellants must show not only that substantial evidence does not support the Commissioner's final decision but that the existing record necessarily establishes entitlement to benefits under applicable legal standards. This daunting challenge likely explains why *Finkelstein* itself did not open the floodgates.

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[11] *See* Br. for Resp't. at 22 n.13; Br. for Pet. at 29-30.

Amicus also fails to acknowledge that appellate litigation is extremely time consuming for claimants' attorneys. It is not highly remunerative – Social Security claimants win relatively few appeals. The appellate courts will not be flooded with appeals from attorneys sinking (very) roughly one hundred hours into an appeal subject to a deferential standard of review.[12]

In any case, because a plaintiff such as Petitioner has a statutory right to a judgment reversing without a remand for a rehearing, 42 U.S.C. § 405(g), even if permitting such appeals were to result in increased appellate litigation, given the plain language of the statute, it is likely that Congress intended the balance to favor appeals to ensure that claimants timely receive the benefits to which they are lawfully entitled.

Amicus and the government also overlook the value of a central function of appellate court decisions – broadcasting the correct legal standards to district courts within the circuit. For future purposes, if the appellate court were to hold that the district court erroneously failed to enter judgment reversing, without a remand for a rehearing, i.e., that the district court should have found Petitioner disabled, then the appellate court's decision would inform that district court specifically, and district courts within the circuit generally, that they should correctly assess whether claimants are entitled to outright awards of benefits, thereby negating any further judicial or administrative delay over such claims. The text of

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[12] *See, e.g., Gibson-Jones v. Apfel*, ___ F. Supp. ___, No. 95-C-874, 1998 WL 57080, at *2-3 (N.D. Ill. Jan. 23, 1998) (referring to 96.5 hours of attorney time expended appealing a district court's affirmance of the Commissioner's decision finding a claimant not disabled).

section 405(g), and practical and jurisprudential factors, thus weigh in favor of holding the district court's judgment was appealable.

VI. Conclusion

The Court should recognize that the effect of the plain language of section 405(g) is to permit Petitioner to appeal and that this result is consistent with Congressional intent. The Court should reverse the Ninth Circuit's dismissal of Petitioner's appeal and order the Ninth Circuit to consider the merits of the appeal.

Respectfully submitted,

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